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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

AZIZ ABU HARRIS,

Defendant and Appellant.

E048404

(Super.Ct.No. RIF138428)

OPINION

APPEAL from the Superior Court of Riverside County. Elisabeth Sichel, Judge.

Affirmed as modified.

Stephen M. Hinkle, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, and Lilia E. Garcia and Meagan J. Beale, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant Aziz Abu Harris appeals from his conviction of assault by means of force likely to produce great bodily injury (Pen. Code,¹ § 245, subd. (a)(1)) and inflicting corporal injury on a spouse (§ 273.5), with related enhancements. Defendant contends his conviction of corporal injury on a spouse must be reversed, because it violates the constitutional prohibition against double jeopardy. We find no error, and we affirm. Defendant also contends, and the People correctly concede, that errors in the abstract of judgment must be corrected.

II. FACTS AND PROCEDURAL BACKGROUND

Defendant was married to Evondra Harris (Evondra) and they had three children together, but they did not live together full time; rather, defendant came and went as he wished. Defendant lived part of the time with another woman, with whom he had three children. Between 11:00 p.m. and midnight on June 14, 2007, defendant left a message on Evondra's cell phone that she was "playing games," because she did not pick up her phone, and he was "going to come beat [her] ass."

At about 1:00 a.m. on June 15, 2007, defendant came to her house and banged on the door. After Evondra let him in, he went to her bedroom, searched in her cell phone, and accused her of talking to other men. He broke the cell phone and began to punch her on the face, head, and nose, and pulled her hair. The beating continued for about 30 minutes. Evondra tried to use her land line telephone to call the police, but defendant

¹ All further statutory references are to the Penal Code.

pulled the plug out. Defendant forced Evondra, who was wearing only her underwear, to go outside, and he threatened to take her somewhere and kill her. She was able to avoid getting in his car, and he eventually let her go back inside. She estimated he had struck her 20 to 30 times with both fists. After he stopped, he said, “Look what you made me do to your face.”

Defendant’s mother called Evondra’s house the next morning, and defendant told her to stay out of their business. The police arrived 10 or 15 minutes later, and Evondra told them she did not want to prosecute defendant because she was afraid he would return and hurt her. She was frightened, crying, and emotional. Her lips and the right side of her face at the lower jaw line were swollen. Her eyes were blackened and were swollen almost entirely closed. She had cuts in the inside of her lip. Her nose was fractured.

The jury found defendant guilty of assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(1)) and inflicting corporal injury on a spouse (§ 273.5, subd. (a).) The jury also found true the allegation that defendant personally inflicted great bodily injury (§§ 12022.7, subd. (a), 1192.7, subd. (c)(8)). Defendant admitted he had a serious felony prior conviction (§ 667, subd. (a).)

The trial court sentenced defendant to the middle term of three years for the assault conviction, a consecutive term of three years for the great bodily injury enhancement as to that count, and a consecutive term of five years for the prior serious felony conviction. The trial court imposed and stayed sentence for the spousal abuse conviction under section 654.

III. DISCUSSION

Defendant contends the double jeopardy clauses of the state and federal Constitutions prohibit multiple criminal convictions based on a single act, and because his convictions of both inflicting corporal injury on a cohabitant and assault were based on a single act, one of his convictions must therefore be reversed.

California statutory and case law permit conviction of multiple offenses based on a single act or indivisible course of conduct while protecting against multiple punishment. (§§ 954, 654.) “Section 954 provides, in pertinent part, that ‘[a]n accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offense . . . under separate counts The prosecution is not required to elect between the different offenses or counts set forth in the accusatory pleading, but the defendant may be convicted of any number of *the offenses* charged’ (Italics added.) ‘Thus multiple charges and multiple convictions can be based on a single criminal act, if the charges allege separate offenses.’ [Citations.]” (*People v. Coyle* (2009) 178 Cal.App.4th 209, 217.) However, under a judicially created exception to the general rule, multiple convictions are prohibited for necessarily included offenses. (*People v. Reed* (2006) 38 Cal.4th 1224, 1227 (*Reed*).)

The *Reed* exception does not apply to defendant’s convictions. In *People v. Sloan* (2007) 42 Cal.4th 110 (*Sloan*), our Supreme Court held that assault by means of force likely to produce great bodily injury is not a lesser included offense of willful infliction of corporal injury on a spouse resulting in a traumatic condition. (*Id.* at pp. 117, 119.)

In *Sloan*, the defendant “threw his wife to the ground, kicked her, and broke her leg,” as a result of which he was convicted of violations of sections 273.5, subdivision (e)(1) (spousal battery with a former conviction) and 245, subdivision (a)(1), among other crimes. (*Sloan, supra*, 42 Cal.4th at pp. 114-115.) Although the trial court stayed his sentence for the violation of section 245, subdivision (a)(1), under section 654, the Court of Appeal vacated that conviction and others “on grounds they violated the rule against multiple convictions based on necessarily included offenses, section 654, and federal double jeopardy principles.” (*Id.* at p. 115.) Our Supreme Court reversed that decision, reaffirming the test it had announced in *Reed, supra*, 38 Cal.4th at p. 1227, i.e., that courts should consider only the statutory elements of the crimes in deciding whether a defendant may be convicted of multiple charged crimes. (*Sloan, supra*, at pp. 120-121.)

Defendant did not acknowledge *Sloan* in his opening brief, and in his reply brief asserted that *Sloan* did not directly address a double jeopardy argument. To the contrary, the *Sloan* court *reversed* the Court of Appeal’s decision to vacate the assault and battery convictions on the ground, among others, of double jeopardy. (*Sloan, supra*, 42 Cal.4th at pp. 114-115.) The Supreme Court explained the federal double jeopardy clause protections, including the prohibition against multiple punishment, are implicated only in successive criminal prosecutions, not a unitary trial. (*Id.* at pp. 120-121.)

Defendant asserts that even though sentence on one of his convictions was stayed under section 654, he might face future adverse consequences, and his conviction should therefore be reversed. In response to a similar argument, the *Sloan* court stated, “The argument that improper multiple punishment might stem from *future* use of multiple convictions under recidivist sentencing statutes like the ‘Three Strikes’ law raises a question that is entirely speculative on these facts and must await a case in which it is squarely presented. [Citation.]” (*Sloan, supra*, 42 Cal.4th at p. 114; see also *id.* at pp. 121-122.) The question is equally speculative on the record before us, and we likewise decline to address it.

Correction of Abstract of Judgment

As defendant points out and the People concede, the trial court’s minute order should be corrected to reflect the finding that a prison prior allegation was not true, and the minute order and abstract of judgment should be corrected to reflect that an enhancement was imposed under section 667, subdivision (a), not section 667.5, subdivision (a). We accept the People’s concession of error and will order the record corrected accordingly.

IV. DISPOSITION

The trial court is directed to order correction of the minute order to reflect the finding that the prison prior allegation was not true and that defendant’s enhancement was imposed under section 667, subdivision (a). The trial court is further directed to order preparation of a corrected abstract of judgment reflecting that defendant’s enhancement was imposed under section 667, subdivision (a), and to forward the

amended abstract to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

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HOLLENHORST

Acting P. J.

We concur:

KING

J.

MILLER

J.